128-45

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~321~~ 60

CHARLES CORNELIUS, PLAINTIFF IN ERROR,

vs.

CATHARINA MARGARETHA KESSEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 1, 1885.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court on an appeal from a judgment of the circuit court of Sheboygan county before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles Cornelius and Catharina Margaretha Kessel, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction
2 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles Cornelius, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western Dist. of Wisconsin.

Allowed by—

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

3 THE UNITED STATES OF AMERICA:

To Catharina Margaretha Kessel, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Charles Cornelius is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Orsamus Cole, chief justice of the supreme court of the State of Wisconsin, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

ORSAMUS COLE,
Chief Justice of the Supreme of Wisconsin.

4 On this tenth day of September, in the year of our Lord one thousand eight hundred and eighty-five, personally appeared before me the subscriber, Fred. Goerlitz, sheriff of Sheboygan county, in Wisconsin, and makes oath that he delivered a true copy of the within citation to the within-named Catharina Margaretha Kessel, on this 10th day of September, A. D. 1885, at the town of Russel, in said Sheboygan county.

FRED. GOERLITZ, *Sheriff.*

Sworn to and subscribed the 10th day of September, A. D. 1885.
[Seal of the Circuit Court, Sheboygan County, Wis.]

SIMON GILLEN,
Clerk of the Circuit Court for the County of Sheboygan, Wisconsin.

[Stamp:] Filed Sep. 17, 1885. Clarence Kellogg, clerk sup. ct. Wis.

5 Know all men by these presents that we, Charles Cornelius, of Maple Works, Clark county, Wisconsin, as principal, and Adam Reichert, of Maple Works, in said Clark county, Wisconsin, and Joseph C. Marsh, of Spokeville, in said Clark county, Wisconsin, as sureties, are held and firmly bound unto Catharina Margaretha Kessel in the full and just sum of seven hundred dollars, to be paid to the said Catharina Margaretha Kessel, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of August, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a supreme court of the State of Wisconsin, in a suit depending in said court between Charles Cornelius, appellant, and Catharina Margaretha Kessel, respondent, a judgment was

rendered against the said Charles Cornelius, and the said Charles Cornelius having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Catharina Margaretha Kessel, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Charles Cornelius shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES CORNELIUS. [SEAL.]
ADAM REICHERT. [SEAL.]
J. C. MARSH. [SEAL.]

Sealed and delivered in presence of—

ANDREW DARNIEDER.
FRED. W. DAVIS.

Approved by—

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

6 STATE OF WISCONSIN, } ss:
Clark County, }

I, O. G. Tripp, clerk of the circuit court, in and for the county and State aforesaid, do hereby certify that I am well acquainted with Adam Reichert and Joseph Marsh, whose names as sureties are attached to the within bond; and, further, that they are each fully responsible for the amount of said bond.

Witness my hand and the seal of said court, at Neilsville, in said county, this 26th day of August, A. D. 1885.

O. G. TRIPP,
Clerk of the Circuit Court.

[Endorsed:] Charles Cornelius *vs.* Catharina Margaretha Kessel. Copy of bond.

[In lead-pencil:] This copy is to be certified to by the clerk of supreme court of Wisconsin, and to be forwarded with the papers to the U. S. Sup. Court. The original is to remain on file in the supreme court of the State.

7 State of Wisconsin, Supreme Court.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original bond on file in my office in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at Madison, the 8th day of September, A. D. 1885.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

8 [Endorsed:] State of Wisconsin. Supreme court. Charles Cornelius against Catharina Margaretha Kessel. Certified copy of bond. Fee for this copy, $—.

9 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the fourteenth day of August, A. D. 1883.

Present: Orsamus Cole, chief justice; William P. Lyon, David Taylor, Harlow S. Orton, and John B. Cassady, associate justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and eighty-three, came into the office of the clerk of the supreme court of the State of Wisconsin, Charles Cornelius, and filed in said court his certain notice of appeal and undertaking according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Sheboygan county, in said State, in the words and figures following, that is to say:

10 *Summons.*

Circuit Court, Sheboygan County.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHERINA MARGARETHA KESSEL, Defendant.

The State of Wisconsin to the said defendant *and each of them:*

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint; of which a copy is herewith served upon you.

CONRAD KREZ,
Plaintiff's Attorney.

P. O. address, Sheboygan, Sheboygan Co., Wis.

11 STATE OF WISCONSIN, *Sheboygan County:*

I hereby certify that on the 28th day of April, 1874, at the town of Rhine, in said Sheboygan county, served the within summons and the annexed complaint personally on the within-named defendant, Catherina Margaretha Kessel, by delivering to and leaving with

said defendant a true copy of the within summons and the annexed complaint.

LOUIS OTTE, *Sheriff.*

Service	$1 00
Copies	50
Travel	4 00
	$5 50

12 *Complaint.*

Circuit Court, County of Sheboygan.

CHARLES CORNELIUS, Plaintiff,
against
CATHARINA MARGARETHA KESSEL, Defendant.

The plaintiff, Charles Cornelius, by Conrad Krez, his attorney, complaining of the above-named defendant, Catharina Margaretha Kessel, by this his complaint respectfully shows to this honorable court that he has the lawful title as the owner in fee simple to the following-described real estate, situate in the town of Russell, in the county of Sheboygan, in the State of Wisconsin, to wit, the northwest quarter of the northwest quarter of section thirteen (13), in township sixteen (16), of range twenty, containing forty acres, according to Government survey; and this plaintiff further shows that he is entitled to the possession of said real estate and that the defendant unlawfully with-olds the possession thereof from the plaintiff, to his damage three hundred dollars.

Wherefore the plaintiff demands that the defendant may
13 be adjudged to surrender the possession of the said real estate to the plaintiff and to pay the plaintiff damages for the unlawful withholding of the same, including the rents and profits thereof, to the sum of three hundred dollars, besides the costs of this suit.

CONRAD KREZ,
Attorney for Plaintiff.

14 *Answer.*

Circuit Court, County of Sheboygan.

CHARLES CORNELIUS, Plaintiff,
against
CATHARINA MARGARETHA. KESSEL, Defendant.

The defendant above named, answering the complaint of the plaintiff in this action, by Wm. H. Seaman, her attorney, denies each and every allegation in said complaint contained, generally and specifically, except that this defendant admits that she is and was at the time of the commencement of this action in the possession of the real estate described in said complaint.

Second. And for a second and further answer to said complaint and defense herein, this defendant alleges that this defendant, and

those under whom she claims, entered into the possession of the said premises described in the complaint in this action under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the said premises, and that there has been a continual possession and occupation of the said premises and of the whole thereof as one tract, included
15 in such instrument of conveyance, under such claim, for more than ten years prior to the commencement of this action; all of which this defendant alleges as a bar to said action, and as objection that the action was not commenced within the time limited by law.

Third. And for a third and further answer to said complaint, and by way of counter-claim, this defendant alleges and shows to this honorable court that, on or about the 29th day of January, A. D. 1856, one Henry I. Davidson—having duly entered two certain tracts of land, to wit, the east half of the northeast quarter of section fourteen, and the said tract described in the complaint herein, viz., the northwest quarter of the northwest quarter of section thirteen, all in town sixteen north, of range twenty east, in said Sheboygan county, as being public lands of the United States subject to entry—paid up in full the purchase-price thereof to the receiver of the land office and obtained the usual duplicate receipt therefor, bearing date on that day, which said receipt was thereafter duly recorded in the office of the register of deeds for the said county of Sheboygan on the 30th day of April, A. D. 1857, in volume
16 3 of deeds, on page 181; that subsequently said tract of land described in the complaint was by due instrument of conveyance by said Henry I. Davidson and his wife duly conveyed to one Joseph Hein, and from said Joseph Hein and through sundry conveyances, all of which particularly appear of record in the register's office of said Sheboygan county, the said tract of land in said complaint mentioned, was duly conveyed to one Jacob Kessel, the testator of this defendant, on or about the 25th day of October, 1869, by deed thereof also duly recorded; that on or about the 29th day of July, 1876, said Jacob Kessel departed this life, in said Sheboygan county, testate and in possession of and so owning in fee and entitled to the possession of said real estate, leaving surviving him this defendant, as his widow, and the following-named children, to wit, Jeremiah Kessel, Elizabeth Kessel, Jacob Kessel, and John Kessel; that the last will and testament of said deceased Jacob Kessel was thereafter duly admitted to probate in the county court of said Sheboygan county on or about the 11th day of September, 1876, and thereby and thereunder there was vested in this defendant, as devisee, a life estate in and
17 to the said real estate, and she became entitled to, entered into, and holds possession thereunder of the same; and that the fee thereof, subject to her said life estate only, was, by the said will, and is vested in the said children, as devisees, therein named. And the defendant further alleges that from the time of said entry by said Henry I. Davidson, down to the death of said Jacob Kessel, there was a continuous and uninterrupted assertion and claim of

title by said Jacob Kessel and his said predecessors in and through such original entry and uninterrupted and continuous possession, and valuable improvements made thereunder without any adverse claim or assertion of any kind, in any manner coming to the knowledge, information, or belief of any of said claimants.

And this defendant further alleges, upon information and belief, that subsequently to the said cash entry of the said two tracts of land by said Henry I. Davidson, and on or about the 24th day of October, 1857, as it now appears, an order or direction of some kind was erroneously and improperly made, or purported to be made in or by the General Land Office of the United States, which purported to cancel such entry by said
18 Davidson for the alleged reason or cause only that such entry was erroneous and improper as to one of said tracts of land, viz., said east half of the northeast quarter of section fourteen, in said receiver's receipt mentioned, for that it was alleged that said one tract of land was included in some prior grant to the State of Wisconsin and not subject to entry by said Davidson, while no question was made or alleged as to the other tract so entered, to wit, the land described in the complaint herein, and such last-mentioned tract was, in fact, at the time of such entry free from conflict and subject to entry, and the purchase price thereof fully paid and acknowledged.

And this defendant further alleges, on information and belief, that such purported order of cancellation of said entry was made without previous notice of any kind to said Henry I. Davidson or any party in interest under such entry, and that no notice or information of such purported order or action of the General Land Office or of any adverse claim was ever given or came to the knowledge of said Henry I. Davidson or said Jacob Kessel or any of the inter-
19 mediate parties in interest under such entry at any time prior to the 21st day of July, 1877, and that the purchase-money paid under such entry or any part thereof was never returned or offered to said Henry I. Davidson or any of said subsequent grantees or successors to his title or claim.

And this defendant further alleges that during all or most of the times hereinbefore mentioned one Abel Keyes was register or receiver of the said land office of the United States for the district in which the said real estate was located and conversant with the records of said office at Menasha, and had at all times ample means of information as to all the facts and circumstances hereinbefore stated as to the claims and possession under such original entry of the said real estate, and that said Abel Keyes, for his own use and benefit, as defendant is informed and believes, and for the purpose of defrauding and depriving this defendant of her rights and equities in the premises, procured to be issued erroneously and wrongfully a purported patent from the United States of the said land described in the complaint, dated June 4, 1877, in favor of one Myron H. Puffer, who acted only for said Keyes therein, upon alleged home-
20 stead application or entry dated December 6, 1876, and forthwith, of even date of such application or alleged entry, con-

veyed to said Abel Keyes such interest as he acquired thereunder, and that any and all claim of title by the plaintiff is derived wholly by or through such fraudulent claim under alleged conveyance by said Abel Keyes and not otherwise, and that prior to any such conveyance the said plaintiff had full and ample notice of the possession and equities and rights of this defendant and her predecessors, as hereinbefore stated.

And this defendant alleges further, on information and belief, that upon notice of the aforementioned rights and equities of this defendant and of the claimants under such entry, by Henry I. Davidson, as aforesaid, and of such subsequent fraudulent and void proceedings and purported patent, the said purported entry by and patent to said Myron H. Puffer were subsequently cancelled by the order of the Commissioner of the General Land Office of the United States by authority of the United States, and all claims thereunder annulled, and the same are now null and void, and all alleged
21 claims of the plaintiff, as well in and to the lands mentioned in said complaint, and that by the same order the said entry of said Henry I. Davidson as to said land was reinstated and became of full force, but this defendant is advised that patent cannot issue in favor of the claimants under such original entry or relief be extended as to the title thereto without the aid of a court of equity in the premises.

Wherefore this defendant prays that it may be adjudged by this court that the title in and to the real estate described in the complaint in this action was in the said Jacob Kessel at the time of his decease, as hereinbefore stated, and that this defendant is entitled to the possession thereof, and that such other or further relief be granted in the premises as may be just, and that the defendant have her costs & disbursements of this action.

Dated June 23rd, 1879.

WM. H. SEAMAN,
Att'y for Defendant.

22 *Reply.*

Circuit Court, Sheboygan County.

CHARLES CORNELIUS *vs.* CATHARINA MARGARETHA KESSEL.

The plaintiff, replying to the defendants counter-claim contained in his answer, denies each and every material allegation contained in such counter-claim.

CONRAD KREZ,
Plaintiff's Att'y.

23 Circuit Court, Sheboygan County.

CHARLES CORNELIUS *vs.* CATHARINA MARGARETHA KESSEL.

Please to take notice that the remittitur of the supreme court on the appeal from the judgment in this action is now on file in the office of the clerk of said circuit court, and that upon such remittitur the plaintiff will at the next general term of said circuit court

to be holden at the court-house, in the city of Sheboygan, on the 17th day of April instant, move said court at the opening of the court on that day, or as soon thereafter as counsel can be heard, to reverse and set aside the judgment in this action and to set aside all findings and proceedings upon which such judgment is based, and also to set aside the notice of trial for said term made by the defendant.

Dated April 8th, 1882.

Yours, etc.,

CONRAD KREZ,
Plaintiff's Attorney.

To Wm. H. Seaman, Esq., attorney for defendant.

24 *Order for New Trial.*

Circuit Court, County of Sheboygan. April Term, 1882.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHARINA MARGARETHA KESSEL, Defendant.

The remittitur of the supreme court, on the plaintiff's appeal from the judgment in this action being on file in this court and it appearing thereby that the judgment in this action was reversed by the supreme court and this court being directed by the same to award a *venire facias de novo*, on motion of Conrad Krez, attorney for plaintiff, and on hearing Wm. H. Seaman, attorney for defendant, ordered that said judgment, the findings of the court, the verdict of the jury be, and the same are hereby, set aside as null and void, and that the trial and proceedings on the trial be, and are hereby, set aside as of no effect, and further ordered that a new trial be, and the same is hereby, granted in this action.

Dated April 18th, 1882

By the court.

PELIX BENFEY, *Clerk.*

25 *Notice of Trial.*

Circuit Court, Sheboygan County.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHARINA MARGARETHA KESSEL, Defendant.

Please take notice that the above-entitled action will be brought to trial and an inquest taken therein at the general term of the aforesaid court, to be holden at the court-house, in the city of Sheboygan, in the said county of Sheboygan, on the 25th day of September next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Sept. 13th, 1882.

Yours, &c.

W. H. SEAMAN,
Def't's Att'y.

To Conrad Krez, att'y for pl'ff.

Service of a copy of above notice admitted this 13th day of September, 1882.

CONRAD KREZ,
Att'y for Plaintiff.

Note of Issue in the Above-entitled Cause.

Conrad Krez, pl'ff's att'y; Wm. H. Seaman, def't's att'y.
Issue of fact for jury. Joined June 6, 1879.

Filed by def't's attorney, September 23rd, 1882.
FELIX BENFEY, *Clerk.*

Notice of Trial.

Circuit Court, Shebogan County.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHARINA MARG. KESSEL, Defendant.

Please take notice that the above-entitled action will be brought to trial and an inquest taken therein at the next general term of the aforesaid court, to be held at the court-house, in the city of Sheboygan, in the said county of Sheboygan, on the fourth Monday of September next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Sept. 13th, 1882.

Yours, &c., CONRAD KREZ,
Plaintiff's Att'y.

To Wm. H. Seaman, att'y for defendant.

Service of a copy of above notice admitted this 14th day of September, 1882.

WM. H. SEAMAN,
Att'y for Defendant.

Note of Issue in the Above-entitled Cause.

Conrad Krez, pl'ff's att'y. Wm. H. Seaman, def't's att'y.
Issue of fact for jury.
Joined June 6, 1879.

Filed by plaintiff's attorney, Sept. 18th, 1882.
FELIX BENFEY, *Clerk.*

26 At a general term of the circuit court for Sheboygan county, held at the court-house, in the city of Sheboygan, on the 4th Monday of September, A. D. 1882.

Present: Hon. N. S. Gilson, judge.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHARINA MARGARETHA KESSEL, Defendant.

The issues joined herein coming regularly on to be heard and

tried in its regular order upon the calendar of jury causes, and the defendant having demanded that the equitable counter-claim presented in the answer herein be first tried and determined by the court it was so ordered, and the court thereupon proceeded to separate trial of such iseues without a jury, and after hearing the testimony adduced by the respective parties thereupon and after hearing counsel for the plaintiff and the defendant, respectively, having held the same under advisement, and after consideration thereupon the court finds and determines as matters of fact:

27 First. That the real estate described in the complaint, to wit, the northwest quarter of the northwest quarter of section 13, in township 16 of range twenty, in Sheboygan county, in the State of Wisconsin, was, on the 29th day of January, 1856, a part of the public domain of the United States, within the district of Wisconsin, known as the Menasha land district, subject to entry and purchase.

Second. That on said 29th day of January, 1856, one Henry I. Davidson made cash entry and purchase of said tract, together with another tract, at the proper land office, paid the purchase price, and obtained the usual receiver's receipt thereupon, which was, subsequently, April 30, 1857, duly recorded in the office of register of deeds for Sheboygan county, in vol. 3 of deeds, on page 181, which said receipt reads as follows:

No. 22953. RECEIVER'S OFFICE AT MENASHA, WIS.,
29 *January*, 1856.

Received of Henry I. Davidson, of Sheboygan county, Wisconsin, the sum of one hundred and fifty dollars, being in full for the east half of the northeast quarter sec. No. fourteen (14) and the northwest quarter of the northwest quarter of section No. thirteen, in township No. 16, of range No. twenty, containing one hundred and

28 twenty acres, at $1.25 per acre.

$150.00, duplicate.

BENJ. H. MORRIS, *Receiver.*

Third. That said purchaser, Davidson, subsequently, to wit, January 4, 1859, with his wife, conveyed said premises described in the complaint, by warranty deed, to one Joseph Hein, who entered into possession, improved and erected a dwelling-house upon the same, and said premises were subsequently conveyed by said Joseph Hein and wife, by warranty deed, to Alois Hein, and by Alois Hein to Henry Loeb, and by Henry Loeb to Jacob Kessel, Oct. 25, 1869, all by successive warranty deeds and all duly recorded in said registrar's office of Sheboygan county, and said premises were in the possession continuously of said grantees successively.

Fourth. That said last grantor, Jacob Kessel, was the husband of the defendant and died testate in said Sheboygan county, July 28, 1876, in the possession of said real estate, and having been in the possession thereof since conveyance to him as aforesaid, and having used and improved the same; that the will of said Jacob Kessel was duly admitted to probate in the county court of said Sheboygan

county on the 11th day of Sept., 1876, and in and by said will the defendant was invested with a life estate in and to all the real
29 estate of said deceased, including that aforesaid, and was as such devisee in the possession thereof at all times subsequently to the death of said Jacob Kessel aforesaid.

Fifth. That on the 6th day of December, 1876, a certificate of entry of said tract of land mentioned in the complaint as an additional homestead entry was issued by the receiver of the said land office at Menasha to one Myron H. Puffer, and subsequently, to wit, June 4, 1877, a patent was thereupon made and issued by the proper officers of the United States, purporting to convey said land to said Myron H. Puffer; said Puffer made quit-claim deed to one Abel Keyes December 6th, 1876, and Keyes deeded to plaintiff March 16, 1878.

Sixth. That on the 3rd day of June, 1879, an order was made by the Commissioner of the General Land Office of the United States reciting among other things that the said certificate of entry so issued to said Henry I. Davidson was, subsequently to its issue, cancelled by said office erroneously and without cause, and that such cancellation should only have been made as to the other tract mentioned in said entry, for which the Government could not, by reason of a prior disposal, pass title, while the tract in question in this action
30 was free from conflict, and it was by said order directed that said cash entry of said Henry I. Davidson as to the said tract here in question be reinstated.

And as conclusions of law thereupon the court finds and decides as follows:

1. That said purchase and cash entry by said Henry I. Davidson and the certificate thereof issued to him, vested in said Henry I. Davidson and his assigns, a valid and subsisting interest in said lands described in the complaint, and the right to a patent from the United States; and the said tract was thereafter segregated from the public domain and not subject to other entry.

2. That the purported cancellation of said Davidson cash entry, founded upon mistake or without cause, was void, and the same was properly reinstated by the land department.

3. That the certificate of additional homestead entry issued to Myron H. Puffer and the patent thereupon subsequently issued were without authority and void.

4. That the defendant's testator, Jacob Kessell, was at the time of his decease vested with all the rights and interest and equities so acquired by said Henry I. Davidson in and to said tract of
31 land, and entitled to the possession thereof; and that the defendant was at the time of the commencement of this action and still is vested with such interest, equities, and possession during her life.

5. That said defendant is entitled to judgment against the plaintiff accordingly; that said entry by and patent to Myron H. Puffer were and are null and of no effect as a conveyance of title to said land; and that said defendant's testator died vested with an equitable title to said premises, and entitled to the possession thereof and to a pat-

ent therefor from the United States assuring the legal title through the -riginal purchasor and grantor, Henry I. Davidson; and that defendant have such interest and estate and possession for and during her life.

6. That said defendant is further entitled to judgment dismissing plaintiff's complaint, and for her costs and disbursements of this action.

And it is further ordeaed that defendant have judgment of this court in her favor and against the plaintiff, in accordance with the foregoing findings and decision.

By the Court.

N. S. GILSON, *Judge.*

32 *Judgment.*

Circuit Court, Sheboygan County.

At a general term of the circuit court for Sheboygan county, held in the city of Sheboygan, in said county, at the court-house, on the 4th Monday of September, 1882.

Present: Hon. N. S. Gilson, judge.

CHARLES CORNELIUS, Plaintiff,

against

CATHARINA MARGARETHA KESSEL, Defendant.

The issues joined herein coming regularly on to be heard and tried in its regular order upon the calendar, and the defendant having demanded that the equitable counter-claim presented in the answer herein be first tried and determined by the court, it was so ordered; and the court thereupon proceeded to separate trial of such issues without a jury, and, after hearing the testimony adduced by the respective parties thereupon, and after hearing counsel for the plaintiff and the defendant, respectively, having held the same under advisement, and after consideration having found and determined as follows, to wit, as matters of fact:

33 First. That the real estate described in the complaint, to wit, the northwest quarter of the northwest quarter of section 13, in township 16, of range 20, in Sheboygan county, in the State of Wisconsin, was, on the 29th day of January, 1856, a part of the public domain of the United States within the district of Wisconsin, known as the Menasha land district, subject to entry and purchase.

Second. That on said 29th day of January, 1856, one Henry I. Davidson made cash entry and purchase of said tract, together with another tract, at the proper land office, paid the purchase price and obtained the usual receiver's receipt thereupon, which was subsequently, April 30, 1857, duly recorded in the office of the register of deeds for Sheboygan county, in vol. 3 of deeds, on page 181, which said receipt reads as follows:

No. 22953.

RECEIVER'S OFEICE AT MENASHA, WIS.,
29 *January*, 1856.

Received of Henry I. Davidson, of Sheboygan county, Wisconsin, the sum of one hundred and fifty dollars, being in full for the east half of the northwest quarter sec. No. fourteen and northwest quarter of northwest quarter of section No. thirteen, in township
34 No. 16, of range No. 20, containing one hundred and twenty acres, at $1.25 per acre, $150.

Duplicate.

BENJ. H. MORRIS, *Receiver.*

Third. That said purchaser, Davidson, subsequently, to wit, January 4, 1859, with his wife, conveyed said premises described in the complaint by warranty deed to one Joseph Hein, who entered into possession, improved, and erected a dwelling house upon the same; and said premises were, subsequently, conveyed by said Joseph Hein and wife by warranty deed to Alois Hein and by Alois Hein to Henry Loeb and by Henry Loeb to Jacob Kessel Oct. 25, 1869; all by successive warranty deeds and all duly recorded in said register's office, of Sheboygan county, and said premises were in the possession continuously of said grantors, successively.

Fourth. That said last grantor, Jacob Kessel, was the husband of the defendant and died testate in said Sheboygan county, July 29, 1876, in the possession of said real estate, and having been in the possession thereof since conveyance to him as aforesaid and having used and improved the same; that the will of said Jacob Kessel was duly admitted to probate in the county court of said
35 Sheboygan county on the 11th day of Sept., 1876, and in and by said will the defendant was invested with a life estate in and to all the real estate of said deceased, including that aforesaid, and was, as such devisee, in the possession thereof at all times subsequently to the death of said Jacob Kessel aforesaid.

Fifth. That on the 6th day of December, 1876, a certificate of entry of said land, mentioned in the complaint as an additional homestead entry, was issued by the receiver of the said land office at Menasha to one Myron H. Puffer, and subsequently, to wit, June 4, 1877, a patent was thereupon made and issued by the proper officers of the United States, purporting to convey said land to said Myron H. Puffer; said Puffer made quit-claim deed to one Abel Keyes Dec. 6, 1876, and Keyes deeded to plaintiff March 15, 1878.

Sixth. That on the 3d day of June, 1879, an order was made by the Commissioner of the General Land Office of the United States, reciting, among other things, that the said certificate of entry so issued to said Henry I. Davidson was subsequent-y to its issue cancelled by said office erroneously and without cause, and that such cancellation should only have been as to the other tract mentioned
36 in said entry for which the Government could not by reason of a prior disposal pass title, while the tract in question in this action was free from conflict, and it was by said order directed

that said cash entry of said Henry I. Davidson as to the said tract here in question be reinstated.

And as conclusions of law thereupon the court found and decided as follows, viz:

1. That said purchase and cash entry by said Henry I. Davidson and the certificate thereof issued to him vested in said Henry I. Davidson and his assigns a valid and subsisting interest in said lands described in the complaint and a right to a patent from the United States, and the said tract was thereafter segregated from the public domain and not subject to other entry.

2. That the purported cancellation of said Davidson cash entry, founded upon mistake or without cause, was void, and the same was properly reinstated by the Land Department.

3. That the certificate of additional homestead entry issued to Myron H. Puffer and the patent thereupon subsequently issued were without authority and void.

4. That the defendant's testator, Jacob Kessel, was at the
37 time of his decease vested with all the rights and interest and equities so acquired by said Henry I. Davidson in and to said tract of land and entitled to the possession thereof, and that the defendant was at the time of the commencement of this action and still is vested with such interest, equities, and possesssion during her life.

5. That said defendant is entitled to judgment against the plaintiff accordingly; that said entry by and patent to Myron H. Puffer were and are null and of no effect as a conveyance of title to said land, and that said defendant's testator died vested with an equitable title to said premises and entitled to the possession thereof and entitled to a patent therefor from the United States assuring the legal title through the original purchaser and grantor, Henry I. Davidson, and that defendant have such interest and estate and possession for and during her life.

6. That said defendant is further entitled to judgment dismissing plaintiff's complaint and for her costs and disbursements of this action.

And further ordering that defendant have judgment of
38 this court in her favor and against the plaintiff in accordance with said findings and decision:

Now, therefore, on motion of William H. Seaman, attorney for said defendant, it is ordered and adjudged that said defendant have judgment against said plaintiff; that said entry by and patents to Myron H. Puffer are null and of no effect as a conveyance of said land; that said defendant's testator died vested with an equitable title to said premises and entitled to the possession thereof and to a patent therefor from the United States assuring the legal title through the original purchaser and grantor, Henry I. Davidson, and that defendant have such interest and estate and possession for and during her life.

And it is further ordered and adjudged that the plaintiff's complaint in this action be, and the same is hereby, dismissed, and that

the said defendants do have and recover of said plaintiff the sum of one hundred and eight & $\frac{41}{100}$ dollars for her costs and disbursements in this action.

Dated December, 27, 1882.

By the court:

FELIX BENFEY, *Clerk.*

39 *Exceptions to Findings.*

Circuit Court, Sheboygan County.

CHARLES CORNELIUS, Plaintiff,

vs.

CATHARINA MARGARETHA KESSEL, Defendant.

And now comes the plaintiff, by Conrad Krez, his attorney, and excepts to the decision of the court upon the trial of the issues of fact in this cause as follows, to wit:

First. The plaintiff excepts to the first fact contained in the findings of the court, because it is not supported by any evidence in the case.

Second. The plaintiff excepts to the second finding of fact in the findings of the court, because the fact found that Henry I. Davidson paid at the U. S. land office for two different tracts of land is contrary to the evidence, which shows the purchase by him of one 120-acre tract, 2-thirds of which was State land.

Third. The plaintiff excepts to the third finding of facts in the finding of the court, because the facts found by the court in such finding are contrary to law and the evidence in the case.

40 Fourth. The plaintiff excepts to that part of the fourth finding of facts by the court by which the court finds that Jacob Kessel improved the land in question, and that by his will the defendant was invested with a life estate in said land as his devisee, because said facts found by the court are contrary to law and against the evidence in the case.

Fifth. The plaintiff excepts to the sixth finding of facts by the court, because the facts found therein are irrelevant to the issue in the case, contrary to law, and unsupported by the evidence in the case.

Sixth. The plaintiff further excepts to the whole findings of fact, because the same fails to find on all the issues under the counter-claim.

The plaintiff further excepts to each and every conclusion of law upon said finding of fact as erroneous in law under the facts found by the court and under the facts as the same appeared by the pleadings and the testimony in the case.

Dated January 6th, 1883.

CONRAD KREZ,
Plaintiff's Attorney.

41 "EXHIBIT A."

Decree for Probate.

STATE OF WISCONSIN:

Sheboygan County Court. In probate.

In the Matter of the Last Will and Testament of JACOB KESSEL, Deceased.

On this 11th day of September, 1876, pursuant to the order of this court made in said matter on the 8th day of August, 1876, the instrument in writing purporting to be the last will and testament of said deceased filed in this court on that day is now here, at the office of the judge of said court, in the city of Sheboygan, in said county, brought on for proof, and the affidavit of A. F. Warden, showing that the notice required to be given by said order has been duly published, as ordered, being filed, and Henry Timmer, one of the subscribing witnesses to said instrument, appearing and being duly sworn, on oath declared that on or about the day of the date of said instrument, to wit, the 18th day of July, A. D. 1876, at the town of Rhine, in said county, the said instrument was signed and sealed by the said Jacob Kessel; that the said Jacob Kessel then and there acknowledged, published, and declared said instrument as and for his last will and testament in presence of the said Timmer and of Wm. Vonder Horst and Andreas Raminger, the other subscribing witnesses; that the said subscribing witnesses did then and there, in the presence of the said Jacob Kessel and at his request, severally subscribe said instrument as witnesses thereto, and that at the time of the execution of the said instrument as aforesaid the said Jacob Kessel was of sound, disposing mind, memory, and understanding, and under no restraint, to the best of the said Henry Timmer's knowledge and belief, and no person appearing to contest the probate of said will:

It is, therefore, considered and decreed that said instrument is duly proved as and for the last will and testament of the said Jacob Kessel, deceased, and the same is hereby allowed and admitted to probate as such, pursuant to the statute in such case made and provided.

By the court:

B. WILLIAMS,
County Judge.

42 [Endorsed:] Sheboygan county court. In probate. In the matter of the last will and testament of —— ——, deceased. Decree for probate. Filed this — day of ——, 188–.

43 I, Jacob Kessel, of the town of Rhine, in the county of Sheboygan and State of Wisconsin, being of sound mind and memory, and mindful of the uncertainties of human life, do make, publish, and declare this my last will and testament, in manner following:

First (1st). After the payment of my just debts and funeral expenses, I give, devise, and bequeath to my beloved wife, Catharina Margaretha, born by the name of Brandt, all my estate, both real and personal, of which I may be the owner at the time of my decease, to have the free use and benefit thereof during her natural life.

Second (2d). Whereas my eldest son, Jeremiah, has been to work in my employ after his 21st year, there shall be paid to him on his demand the sum of one thousand and five hundred dollars for said work and labor done in my employ.

Third (3*th*). After the death of my said beloved wife I ordain that at said time my estate is to be divided between my children now living or living at the time of my decease, in equal parts, share and share alike.

Fourth (4th). If any of my children is not alive when the division is made, then and in such case his, her, or there heirs shall receive his, her, or there share.

Fifth (5th). I hereby nominate and ap-oint my said beloved wife the executrix of this my last will and testament, and hereby
44 authorize and empower her to compound, compromise, and settle any claim or demand which may be against or in favor of my said estate.

In witness whereof I have set hereunto my hand and seal the 18th day of July, A. D. 1876.

JACOB KESSEL. [SEAL.]

The above instrument was signed, published, and declared by the said testator to be his last will and testament in the presence of us, who have signed our names, at his request, as witnesses in his presence and in presence of each other: Henry Timmer, of the town of Holstein, Calumet Co.; Wm. Vonderhorst, of the same place; Andreas Raminger, of the town of Russel, county Sheboygan.

45 STATE OF WISCONSIN, } ss:
Sheboygan County, }

In Probate. Sheboygan County Court.

I, B. Williams, judge of the county court of said county, do hereby certify that I have compared the annexed copies of the last will and testament of Jacob Kessel, deceased, and also the decree of probate thereto, with the original record kept in said county court, and that the same is a true copy thereof and of the whole of said original records.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the county court of said county, at the city of Sheboygan, in said county, this 25th day of September, A. D. 1882.

[Seal Sheboygan County Court, Wisconsin.]

B. WILLIAMS,
County Judge.

46 [Endorsed:] "Ex. A." W. C. K. Sheboygan county court, in probate. In the matter of the last will and testament of Jacob Kessel, deceased. Certified copy of last will and testament and decree of probate.

47 "Exhibit B."

No. 22953.

Receiver's Office at Menasha, Wis.,
29th January, 1856.

Received from Henry I. Davidson, of Sheboygan county, Wisconsin, the sum of one hundred & fifty dollars, being in full for the east half of northeast — sec. No. fourteen, & northwest qr. of northwest quarter of section No. thirteen, in township No. sixteen, of range No. twenty, containing one hundred & twenty acres, at $1.25 per acre.

$150.00. Duplicate.

BENJ. H. MOORES, *Receiver.*

Register's Office, Sheboygan Co.

Rec'd for record April 30th, 1857, at 3½ o'clock p. m.

CHARLES MEYER, *Register.*

"Exhibit B."

[Endorsed:] Copy of duplicate receipt.

48 "Exhibit C."

This indenture, made the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, between Henry I. Davidson, of Rhine, county of Sheboygan, State of Wisconsin, of the first part, and Joseph Hine, of Russell county and State aforesaid, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of two hundred and seventy-five dollars paid by the said party of the second part, the receipt whereof is hereby acknowledged, has given, granted, sold, remised, released, aliened, conveyed, and confirmed, and by these presents does give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that certain tract, piece, or parcel of land situate, lying, and being in the county of Sheboygan, State of Wisconsin, described as follows, to wit: The northwest quarter of the northwest quarter of section thirteen (13), in township sixteen (16), of range twenty (20), being forty (40) acres, according to Government survey, being more or less:

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainder or remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatever of the said party of the first part, either in law or in

49 equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances:

To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, unto his heirs and assigns, forever.

And the said Henry I. Davidson, for his heirs, executors, administrators, and assigns, does covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above described, as of a good, sure, perfect, absolute, and inde-asible estate of inheritence in law in fee simple, and that the same are free and clear of all incumbrances whatever, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the the second part, his heirs and —, against all and every person lawfully claiming or to claim the whole or any part thereof, he shall and will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set *his* hand and seal the day and year first above written.

HENRY I. DAVIDSON. [L. S.]
HARRIET DAVIDSON. [L. S.]

Signed, sealed, and delivered in presence of—
ERIS TALLMAGE.
JAS. T. DILLINGHAM.

STATE OF WISCONSIN, } *ss:*
County of Sheboygan, }

50 Be it remembered that on the fourth day of January, A. D. 1859, personally came before me the above-named Henry I. Davidson & Harriet Davidson, to me known to be the persons who executed the above deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

JAS. P. DILLINGHAM,
Notary Public.

REGISTER'- OFFICE, SHEBOYGAN CO.
Rec'd for record February 17th, 1859, at 10 o'clock a. m.
J. WEISKOPF, *Register,*
By W. KUNZ, *D'p'ty.*

Exhibit C.

[Endorsed:] Copy. Deed of Henry I. Davidson to Joseph Hein.

51 "EXHIBIT D."

This indenture, made the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and sixty-four, between Joseph Hein and Eleonora, his wife, parties of the first part, and Alois Hein, party of the second part, all of Sheboygan county and State of Wisconsin, witnesseth:

That the said parties of the first part, for and in consideration of the sum of eight hundred dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that certain tract, piece, or parcel of land situate, lying, and being in the county of Sheboygan, State of Wisconsin, to wit: The southwest quarter of the northeast quarter of section No. thirteen (13), of township No. sixteen (16) north, of range No. twenty (20) east, containing forty acres, more or less, and the northwest quarter of the northwest quarter of section No. thirteen (13), of township No. sixteen (16) north, of range No. twenty (20) east, containing forty acres, more or less, according to Government survey—

[1.00 stamps.]

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said part- of the first part, either in
52 law or in equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances:

To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part and to his heirs and assigns forever, and the said Joseph Hein and Elenora, his wife, of above county and State, the-re heirs, executors, administrators, and assigns, do covenant, grant, bargain, and agree to and with the said part- of the second part, — heirs or assigns, that at the time of ensealing and delivery of these presents they *was* well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law in fee simple, and that the same are free and clear of all incumbrances whatever, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part, their heirs and —, against all and every person or persons lawfully claiming or to claim the whole or any part thereof they shall and will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOSEPH HEIN. [L. S.]
ELENORA HEIN. [L. S.]

Signed, sealed, and delivered in presence of—
AUGUST SCHELLBURG.
BERNARD CERAHAR.

STATE OF WISCONSIN, } *ss:*
County of Sheboygan, }

53 Be it remembered that on the twenty-ninth day of September, A. D. 1864, personally came before me the above-named

Joseph Hein and Eleonora, his wife, to me known to be the person who executed the above deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

AUGUST SCHELLBURG,
Justice of the Peace.

Received for record at 2 o'clock p. m., December 5th, 1864.
W. KUNZ, *Register.*

Exhibit D.

[Endorsed:] Copy. Deed of Joseph Hein & wife to Alois Hein.

54 "EXHIBIT E."

This indenture, made the sixth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, between Alois Hein and Catherine Hein, parties of the first part, and Henry Loeb, party of the second part, all of the county of Sheboygan, State of Wisconsin, witnesseth: That the said parties of the first part, for and in consideration of the sum of one thousand and two dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever all that certain piece or parcel of land lying in Sheboygan county, State of Wisconsin, and known and described as follows, to wit:

The west half of the northwest quarter of section thirteen (13) in township sixteen (16) north, of range twenty (20) east, containing eighty acres according to Government survey, be the same more or less—

[$1.50 stamps.]

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, either in possession or expectancy, of, in, and to the above-bargained premises and their hereditaments and appurtenances:

To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part and to his heirs and assigns forever.

And the said Alois Hein, for himself, his heirs, executors, and administrators, do- covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns,

against all and every person or persons lawfully claiming the whole or any part thereof, he will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ALOIS HEIN. [SEAL.]

CATHERINE her x mark. HEIN. [SEAL.]

Signed, sealed, and delivered in presence of—
GEORGE PLUMMER.
J. T. DILLINGHAM.

STATE OF WISCONSIN, } ss:
Sheboygan County, }

Be it remembered that on the 6th day of April, A. D. 1868, personally came before me the above-named Alois Hein and Catherine Hein, to me known to be the persons who executed the said deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

J. T. DILLINGHAM,
Notary Public.

Received for record at 12 o'clock m., April 15, 1868.
ALBERT MAHLENDORF, *Register.*

"Exhibit E."

55 [Endorsed:] No. —. Copy. Alois Hein & wife to Henry Loeb. Warranty deed.

REGISTER'S OFFICE, SHEBOYGAN COUNTY, WIS.

Received for record the 11th day of April, A. D. 1868, at 12 o'clock m., and recorded in vol. -- of deeds, on page —.

ALBERT MALENDORD,
Register of Deeds.

56 "EXHIBIT F."

This indenture, made the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, between Henry P. Loeb & Charlotte Louise Loeb, parties of the first part, and Jacob Kessel, party of the second part, all of the county of Sheboygan, & State of Wisconsin—

Witnesseth that the said parties of the first part for and in consideration of the sum of nineteen hundred and fifty dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have given, granted, bargained, sold, remised, released, aliened, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, remise, release, alien, convey, and confirm, unto the said party of the second part, his heirs and assigns, forever, all those certain pieces or parcels of land situated in Sheboygan county, State of Wisconsin, and known and de-

scribed as follows, to wit: The west half of the northwest quarter of section thirteen (13) and the south one-third running east and west of the southeast quarter of the northeast quarter of section No. fourteen (14) and all the land in the west half of the northeast quarter of said section fourteen (14) lying south of the road as it is now traveled across said quarter section, all the above in township sixteen (16) north of range twenty (20) east, containing in all one hundred forty-one and one-third acres (141⅓), be the same more or less—

[$2.00 stamps, cancelled.]

57 Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or in equity, either in possession or expectancy, of, in, and to the above-bargained premises and their hereditaments and appurtenances:

To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part and to his heirs and assigns forever; And the said Henry P. Loeb, for himself, his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents — well seized of the premises above described as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee simple, and that the same are free and clear from all incumbrances whatever; and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof he will forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HENRY P. LOEB. [L. S.]
CHARLOTTE LOUISE LOEB. [L. S.]

Signed, sealed, and delivered in presence of—

F. OMIG.
J. T. DILLINGHAM.

58 STATE OF WISCONSIN, } ss:
County of Sheboygan, }

Be it remembered that on the 25th day of October, A. D. 1869, personally came before me the above-named Henry P. Loeb & Charlotte Louise Loeb, to me know- to be the persons who executed the said deed, and acknowledged the same to be their free act and deed for the uses and purposes therein mentioned.

J. T. DILLINGHAM,
Notary Public.

Received for record at 9 o'clock a. m. November 1, 1869.
NATHAN COLE, *Register*,
Per G. MARGUARDT, *Deputy*.

[Endorsed:] Copy. Deed of Henry P. Loeb and wife to Jacob Kessel.

59 EXHIBIT G.

LAND OFFICE,
MENASHA, WIS., *April 9th*, 1879.

I, Geo. W. Fay, register of the United States land office at Menasha, Wis., do hereby certify that the northwest quarter of the northwest quarter of section No. thirteen, in township No. sixteen, of range No. twenty E., was entered at this office, at Menasha, Wis., on the sixth day of December, A. D. 1876, in the name of Myron H. Puffer, as appears from the books of record hereof, and that the same was patented to Myron H. Puffer June 4th, 1877.

I further certify that I have examined and compared the foregoing with the records now in my office and find the same to be a correct transcript therefrom.

Given under my hand the day and year above written.

(Signed) GEO. W. FAY, *Register*.

[Endorsed:] Duplicate certificate.

60 EXHIBIT "H."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 17, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed pages 1 to 12, inclusive, is a true and literal exemplification of the letter of this office, dated June 3, 1879, to the register and receiver at Menasha, Wisconsin, reinstating cash entry No. 22953.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. A. WILLIAMSON,
Commissioner of General Land Office.

61 (Copy.)

Refer in reply to this initial: "C."

#36732, 66611, 77431, R. S. G.
N. 49424, 67264. O. 19787. M. E. N. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 3d*, 1879.

Register & receiver, Menasha, Wis.

GENTLEMEN: This office is in receipt of letters from the Hon. E. S. Bragg, of Wisconsin, dated April 28, 1878, and W. H. Seaman,

Esq., dated Sheboygan, Wis., May 21st inst. (the latter by reference from the Hon. J. A. Bentley), touching cash entry No. 22953, by Henry J. Davidson, for the E. ½ of N. E. ¼ sec. 14 and the N. W.
62 ¼ of N. W. ¼ sec. 13, township 16 north, of range 20 east, dated Jan. 29, 1856, heretofore canceled by this office, and conflict-additional homestead entry No. 1439 (final cert. No. 489), by Myron H. Puffer, for the N. W. ¼ of N. W. ¼ of said sec. 13, township 16 north, of range 20 east, dated Dec. 6, 1876, upon which latter entry patent issued June 4, 1877, asking that this office furnish such re*lief* as may be within its power to the parties occupying and claiming to hold said N. W. ¼ of N. W. ¼ sec. 13 under and by virtue of said cash entry No. 22953.

An examination of the files and records of this office shows
63 the following state of facts in connection with the entries above referred to:

Jan. 29, 1856, Henry J. Davidson made cash entry No. 22953 for the N. W. ¼ of N. W. ¼ of sec. 13 and the E. ½ of N. E. ¼ sec. 14, township 16 north, of range 20 east, which entry was canceled by this office Oct. 24, 1857, because of conflict as to the E. ½ of N. E. ¼ of said sec. 14, said tract having been approved to the State of Wisconsin as "swamp land" Oct. 28, 1854, and patented as such Dec. 13, 1856, and the local officers were duly notified of such cancellation by office letter of said date (viz., Oct. 24, 1857) and in-
64 structed to notify the party to make his application for the return of the purchase-money in the case of said cash entry.

On the 6th day of Dec., 1876 (no adverse right, as appeared from the tract book, attaching to said tract), the N. W. ¼ of N. W. ¼ of said sec. 13, township 16 north, of range 20 east, was entered by Myron H. Puffer, per additional homestead application No. 1439 (final cert. No. 489), the same being made as an additional entry to homestead entry No. 416, dated Feb. 15, 1867, commuted Aug. 20, 1868, per cash certificate No. 27902, and patent issued on said entry June 4, 1877.

65 It is stated by the Hon. E. S. Bragg, in his letter of April 28, 1878, that Mr. Davidson, having no knowledge of the cancellation of his said entry No. 22953, conveyed both the tracts embraced therein to certain parties, who in turn conveyed them until, some years ago, they came into possession, through said conveyances, of Jacob Kessel, who occupied all the land embraced in said cash entry, his buildings being on the N. W. ¼ of N. W. ¼ of said sec. 13, he having occupied the land for more than ten years and his grantor before him for nine years. Mr. Kessel being now dead, his heirs have continued in uninterrupted possession
66 until confronted by a claim of title to said N. W. ¼ of N. W. ¼ of sec. 13 by one Abel Keyes under a conveyance from Myron H. Puffer dated Dec. 6, 1876 (one of even date with the entry of Puffer, it will be observed), and producing the patent issued to Puffer June 4, 1877.

From the various facts connected with these entries I make the following deductions:

First. That the cancellation by this office, on Oct. 24, 1857, of the

entire entry of Henry J. Davidson because of a conflict as to
67 one of the tracts embraced therein without first giving the party
the right of election as to whether he desired to retain the tract found to be free from conflict was erroneous, and cancellation should have been made only as to the tract for which the Government could not, by reason of a prior disposal, pass title. That Mr. Davidson never had an opportunity to exercise the right of election as to the cancellation of his entire entry is shown conclusively by the records of this office, as the same letter which conveyed the intelligence of the conflict as to one of the tracts canceled, as before stated, the entire entry by reason of said conflict. Again,
68 the fact that more than twenty years have elapsed since the cancellation of said entry without application having been made for the return of the purchase-money is very good evidence that neither Mr. Davidson or his assignees ever had notice of such cancellation.

Second. The additional entry of Myron H. Puffer was clearly a speculative entry, made, as a matter of fact (it would appear), by Abel Keyes (his conveyance from Puffer, as before noted, bearing even date with the entry itself), and made upon land which twenty years of settlement and cultivation would seem to give sufficient notice was occupied at the date of said entry, and it
69 would seem that the principle laid down by the Supreme Court of the United States in the case of Atherton *vs.* Fowler (6 Otto, 513) would maintain in this case, viz., that "the generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor and authorise him to turn that man and his family out of their home."

In fact, taking into consideration the speculative uses to which additional homestead rights are put and the ease with which they are located, I am of opinion that the principle above referred
70 to would apply to this class of entries with additional force, and it is manifestly the duty of this office in every legal manner to protect the settler upon the public lands who has made his settlement and improvements in good faith, and holding, as he beleives, under a valid entry, from those who locate additional homestead rights upon land which his labor has improved and made valuable.

By my letter of May 14, 1878, you were instructed to call upon Myron H. Puffer to surrender the patent issued to him in the case of said additional homestead entry, and in your letter of
71 June 20, 1878, that when called upon to surrender said patent Mr. Puffer informed you that he had sold the land and that the patent was not in his possession.

Holding to the view that the arbitrary cancellation by this office of said cash entry No. 22953 as to the N. W. ¼ of N. W. ¼ of sec. 13, township 16 north, of range 20 east, which tract was at that date in market, free from conflict, and subject to entry, was erroneous, and further strengthened by the preponderating equities on the side of the parties claiming under the cash entry, with the design of
72 giving said claimants the best possible standing in an equity

court, to which tribunal they will (it is stated) be compelled to resort to defend their title, by reason of an ejectment suit to be brought by the party claiming under the Puffer patent, I have this day reinstated said cash entry No. 22953 as to the N. W. ¼ of N. W. ¼ sec. 13, township 16 north, of range 20 east, upon the files and records of this office; and were this office not estopped from so doing by a decision of the Supreme Court (see case of Moore *vs.* Robbins, 6 Otto, 530) I would order patent to issue on said entry for said tract.

73 You will note the reinstatement of said cash entry No. 22953, as above indicated, upon your records, thereafter notifying this office of the fact, and advise all parties who may have been in correspondence with your office touching this case of the contents of this letter.

Hon. E. S. Bragg and Hon. J. A. Bentley, in this city, and Conrad Kres, Esq., of Sheboygan, Wis., will be furnished with copies of this letter from this office.

Very respectfully,

(Signed) J. A. WILLIAMSON,
Commissioner.

74 "EXHIBIT I."

This indenture, made the sixth day of December, in the year of our Lord one thousand eight hundred and seventy-six, between Myron H. Puffer and Nellie B. Puffer, his wife, of the city of Menasha, parties of the first part, and Abel Keyes, of the same place, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of fifty dollar- to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, ha- given, granted, bargained, sold, remised, released, and quitclaimed, and by these presents do give, grant, bargain, sell, remise, release, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all the following-described real estate, situated in the county of Sheboygan and State of Wisconsin, to wit: The northwest quarter of the northwest quarter of section thirteen (13), township number sixteen (16) north, range number twenty east (20), containing forty acres, according to Government survey; to have and to hold the same, together with all and singular the appurtenances and privileges thereto belonging or appertaining, and all the right, interest, and claim whatsoever of the said parties of the first part, to the only proper use and benefit of the said party of the second part, his heirs and assigns, forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

MYRON H. PUFFER. [SEAL.]
NELLIE B. PUFFER. [SEAL.]

75 Signed, sealed, and delivered in presence of—
FRANK A. KEYES,
EDWARD E. KEYES.

[Endorsed:] Copy. Deed of Myron H. Puffer and wife to Abel Keyes.

STATE OF WISCONSIN, *Winnebago County,* } ss:

Be it remembered that on this sixth day of December, A. D. 1876, the said Myron H. Puffer and Nellie B., his wife, who are to me personally known, appeared before me and acknowledged the foregoing instrument to be their free act and deed for the uses and purposes therein contained.

FRANK A. KEYES,
Notary Public, Winnebago Co., Wis.

76 "EXHIBIT K."

This indenture, made the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, between Abel Keyes, of the city of Menasha, Winnebago county, Wisconsin, party of the first part, and Charles Cornelius, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of four hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, ha- given, granted, bargained, sold, remised, released, and quitclaimed, and by these presents do- give, grant, bargain, sell, remise, release, and quitclaim, unto the said party of the second part and to his heirs and assigns forever all the following-described real estate, situate in the county of Sheboygan and State of Wisconsin, to wit: The northwest quarter of the northwest quarter of section thirteen (13), township sixteen (16), range twenty (20), containing forty acres, according to Government survey:

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or appertaining, and all the right, interest, and claim whatsoever of the said party of the first part, to the only proper use and benefit of the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part ha- hereunto set his hand and seal the day and year first above written.

ABEL KEYES. [SEAL.]

Signed, sealed, and delivered in presence of—
C. A. KEYES.
P. V. LAWSON, JR.

77 [Endorsed:] Copy. Deed of Abel Keyes to Charles Cornelius.

STATE OF WISCONSIN, *Winnebago County,* } ss:

Be it remembered that on this fifteenth day of March, A. D. 1878, the said Abel Keyes, who is to me personally known, appeared be-

fore me and acknowledged the foregoing instrument to be his free act and deed for the uses and purposes therein contained.

P. V. LAWSON,
Notary Public, Winnebago County, Wisconsin.

REGISTER'S OFFICE, SHEBOYGAN CO.

Received for record March 25, 1878, at 1 o'clock p. m., and recorded — vol. 40 of deeds on page No. 415.

ERNST CLAMBACH, *Register.*

78 EXHIBIT L.

I, Coles Bashford, Governor of the State of Wisconsin, to all to whom the- presents shall come, Greeting:

I, Coles Bashford, Governor of the State of Wisconsin, in pursuance of the provisions of an act of the Legislature of this State entitled "An act for the protection of the swamp and overflowed lands in this State and to grant pre-emption rights thereon," approved April 2nd, 1855, do hereby certify that the annexed descriptive list embraces a correct description of all the swamp and overflowed lands in the county of Sheboygan, as appears by the records in this department, enuring to this State under the provisions of an act of Congress entitled "An act to enable the State of Arkansas and other States to redeem the swamp land within their limits," approved September 28th, 1850.

In testimony whereof I have hereunto subscribed my name and caused the great seal of the State of Wisconsin to be affixed.

Done at Madison this first day of January, 1857.

By the Governor:

COLES BASHFORD.

[L. S.] D. W. JONES,
Sec'ty of State.

E. ½ of N. E. ¼, section 14, township, 16, range 20, 80 acres.

79 "EXHIBIT M."

Homestead Certificate No. 489. *Application* 1439.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Menasha, Wisconsin, whereby it appears that pursuant to the act of Congress, approved 20th May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Myron H. Puffer has been established and duly consummated in conformity to law for the northwest quarter of the northwest quarter of section thirteen, in township sixteen, of range twenty, in the district of lands subject to sale at Menasha, Wisconsin, containing forty acres according to the official plat of the survey

of the said land returned to the General Land Office by the surveyor general:

Now know ye that there is, therefore, granted by the United States unto the said Myron H. Puffer the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Myron H. Puffer and to his heirs and assigns forever.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

80 Given under my hand, at the city of Washington, the fourth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

By the President:

R. B. HAYES,
[SEAL.] By B. L. LANG,
Asst. Secretary.

Recorded vol. 1, page 476.

S. W. CLARK,
Recorder of the General Land Office.

REGISTER'S OFFICE, SHEBOYGAN CO.

Received for record July 21, A. D. 1877, at 1 o'clock p. m., and recorded vol. 42 of deeds, on page No. 13.

ERNST CLAMBACH, *Register.*

[Endorsed:] Not compared. U. S. patent to Myron H. Puffer.

81 EXHIBIT N.

At a general term of the circuit court for Sheboygan county, held at the court-house in the city of Sheboygan on the fourth Monday of September, A. D. 1882.

Present: Hon. N. S. Gilson, judge.

CHARLES CORNELIUS, Plaintiff,
vs.
CATHARINA MARGARETHA KESSEL, Defendant.

The issues joined herein coming regularly on to be heard and tried in its regular order upon the calendar of jury causes, and the defendand having demanded that the equitable counter-claim presented in the answer herein be first tried and determined by the court, it was so ordered, and the court thereupon proceeded to separate trial of such issues without a jury; and after hearing the testimony adduced by the respective parties thereupon, and after hearing counsel for the plaintiff and defendant, respectively, having held the same under advisement, now, after consideration thereupon, the court find- and determines as matters of fact:

First. That the real estate described in the complaint, to wit, the

northwest quarter of the northwest quarter of section 13, in township 16, of range twenty, in Sheboygan county, in the State
82 of Wisconsin, was, on the 29th day of January, 1856, a part of the public domain of the United States, within the district in State of Wisconsin know- as the Menasha land district, subject to entry and purchase.

Second. That on the said 29th day of January, 1856, one Henry I. Davidson made cash entry and purchase of said tract, together with another tract, at the proper land office, paid the purchase price, and obtained the usual receiver's receipt thereupon, which was subsequently, April 30, 1857, duly recorded in the office of register of deeds for Sheboygan county, in vol. 3 of deeds, on page 181, which said receipt reads as follows:

No. 22953.

RECEIVER'S OFFICE, MENASHA, WIS., 29 *January*, 1856.

Received of Henry I. Davidson, of Sheboygan county, Wisconsin, the sum of one hundred and fifty dollars, being in full for the east half of the northeast quarter sec. No. fourteen (14), and northwest quarter of the northwest quarter of section thirteen, in township No. 16, of range No. twenty, containing one hundred and twenty acres, at $1.25 per acre.

$150.00. Duplicate.

BENJ. H. MOORES, *Receiver.*

Third. That said purchaser, Davidson, subsequently, to
83 wit, January 4, 1859, with his wife, conveyed said premises described in the complaint by a warranty deed to one Joseph Hine, who entered into possession, improved and erected a dwelling-house upon the same; and said premises were subsequently conveyed by said Joseph Hine and wife, by a warranty deed, to Alois Hine, and by Alois Hine to Henry Loeb, and by Henry Loeb to Jacob Kessel, Oct. 25, 1869, all by successive warranty deeds, and all duly recorded in said register's office of Sheboygan county, and said premises were in the possession continuously of said grantee successively.

Fourth. That said last grantee, Jacob Kessel, was the husband of the defendant and died testate in said Sheboygan county July 29, 1876, in the possession of said real estate, and having been in the possession thereof since conveyance to him as aforesaid, and having used and improved the same; that the will of said Jacob Kessel was duly admitted to probate in the county court of said Sheboygan county on the 11th day of Sept., 1876, and in and by said will the defendant was invested with a life interest in and to all the real estate of said deceased, including that aforesaid, and was as such devisee in the possession thereof at all times subsequently to the death of said Jacob Kessel as aforesaid.

84 Fifth. That on the 6th day of December, 1876, a certificate of entry of said tract of land mentioned in the complaint as an additional homestead entry was issued by the receiver of the said land office at Menasha to one Myron H. Puffer, and subsequently, to

wit, June 4th, 1877, a patent was thereupon made and issued by the proper officers of the United States, purporting to convey said land to said Myron H. Puffer; said Puffer made quitclaim deed to one Abel Keyes Dec. 6, 1876, and Keyes deeded to plaintiff March 15, 1878.

Sixth. That on the 3rd day of June, 1879, an order was made by the Commissioner of the General Land Office of the United States reciting, among other things, that the said certificate of entry so issued to said Henry I. Davidson was subsequently to its issue cancelled by said officer erroneously and without cause, and that such cancellation should only have been made as to other tracts mentioned in said entry for which the Government could not, by reason of a prior disposal, pass title while the tract in question in this action was free from conflict, and it was by said order directed that said cash entry of said Henry I. Davidson as to the said tract here in question be reinstated.

And, as conclusion of law thereupon, the court finds and decides as follows:

85 1. That said purchase and cash entry by said Henry I. Davidson and the certificate thereof issued to him vested in said Henry I. Davidson and his assigns a valid and subsisting interest in said lands described in the complaint and the right to a patent from the United States, and the said tract was thereafter segregated from the public domain not subject to other entry.

2. That the purported cancellation of said Davidson's cash entry founded upon mistake or without cause was void, and the same was properly reinstated by the Land Department.

3. That the certificate of additional homestead entry issued to Myron H. Puffer and the patent thereupon subsequently issued were without authority and void.

4. That the defendant's testator, Jacob Kessel, was at the time of his decease vested with all the rights and interest and equities so acquired by said Henry I. Davidson in and to said tract of land and entitled to the possession thereof, and that the defendant was at the time of the commencement of this action and still is vested with such interest, equities, and possession for her life.

5. That said defendant is entitled to judgment against the plaintiff accordingly; that said entry by and patent to Myron H. Puffer were and are null and of no effect as a conveyance of title to
86 said land, and that said defendant's testator died vested with an equitable title to said premises and entitled to the possession thereof and a patent therefor from the United States assuring the legal title through the original purchaser and grantor, Henry I. Davidson, and that defendant have such interest and estate and possession for and during her life.

6. That said defendant is further entitled to judgment dismissing plaintiff's complaint, and for her costs and disbursements of this action.

And it is further ordered that defendant have judgment of this

court in her favor and against the plaintiff in accordance with the foregoing findings and decisions.

By the court:

(Signed) N. S. GILSON, *Judge.*

87 EXHIBIT O.

Circuit Court, County of Sheboygan.

CHARLES CORNELIUS, Plaintiff,

vs.

CATHARINA MARGARETHA KESSEL, Defendant.

And now comes the plaintiff, by Conrad Krez, his attorney, and excepts to the decision of the court upon the trial of the issues of fact in this cause as follows, to wit:

First. The plaintiff excepts to the first fact contained in the findings of the court because it is not supported by any evidence in the case.

Second. The plaintiff excepts to the second finding of fact in the findings of the court because the fact found that Henry I. Davidson paid at the U. S. land office for two different tracts of land is contrary to the evidence, which shows the purchase by him of one 120-acre tract, 2-thirds of which was State land.

Third. The plaintiff excepts to the third finding of facts in the finding- of the court because the facts found by the court in such finding are contrary to law and the evidence in the case.

Fourth. The plaintiff excepts to that part of the fourth finding of facts by the court by which the court finds that Jacob Kessel improved the land in question and that by his will the defend-

88 ant was invested with a life estate in said land as his devisee because said facts found by the court are contrary to law and against the evidence in the case.

Fifth. The plaintiff excepts to the sixth finding of facts by the court because the facts found therein are irrelevant to the issue in the case, contrary to law, and unsupported by the evidence in the case.

Sixth. The plaintiff further excepts to the whole finding of facts because the same fails to find on all the issues under the counter-claim.

The plaintiff further excepts to each and every conclusion of law upon said findings of fact as erroneous in law under the facts found by the court and under the facts as the same appeared by the pleadings and the testimony in the case.

Dated January 6th, 1883.

CONRAD KREZ,
Plaintiff's Attorney.

89 *Bill of Exceptions.*

Circuit Court, County of Sheboygan.

CHARLES CORNELIUS *vs.* CATHARINA MARGARETHA KESSEL.

At the September term of the circuit court of Sheboygan county, A. D. 1882, this action, being the first on the calendar for trial by jury, was duly reached in its regular order for trial, and the following proceedings were had:

When the case was called the defendant, by *his* counsel, moved first for a trial of the equitable issue under the counter-claim, to which motion the plaintiff, by his counsel, objected, because the facts alleged as counter-claim do not constitute a counter-claim. The objection was overruled by the court, and the plaintiff, by his counsel, excepted to such ruling.

Thereupon the court ordered the trial of the counter-claim to be first had by the court; to which order the plaintiff, by his counsel, excepted.

The defendant then offered in evidence a certified copy of the will of Jacob Kessel, dated September 11, 1876, and of the
90 decree of probate thereof, a copy of which is hereto annexed, marked Exhibit "A," and forms part hereof.

The plaintiff then objected to the admission of any evidence under the counter-claim because such counter-claim does not set up facts sufficient to constitute a cause of action against the plaintiff and because the counter-claim shows that if the defendant had had any equitable claim it has become stale by the lapse of time. The objection was overruled by the court, and the plaintiff, by his counsel, excepted to such ruling of the court.

The defendant then offered in evidence the record of receiver's receipt No. 22953, recorded in the office of the register of deeds of Sheboygan county in volume 3 of deeds, on page 181, on the 30th day of April, 1857, a copy of which is hereto annexed and made part hereof, marked "Exhibit B."

The plaintiff, by his counsel, objected to its admission in evidence on the ground of its irrelevancy and incompetency under the pleadings. The court overruled the objection, and the plaintiff excepted to such ruling by the court. The record was then read in evidence.

91 Defendant, by *his* counsel, then offered in evidence the record of a warranty deed for the land described in the complaint from H. I. Davidson and wife to Joseph Hine, dated January 14th, 1859, recorded in said register's office in volume 6 of deeds on page 570, a copy of which is hereto annexed and made part hereof, marked "Exhibit C."

The plaintiff then, by his counsel, objected to its admission in evidence on the ground of irrelevancy and incompetency and because it appears by the pleadings that said Davidson's custody of the land described in said deed had been cancelled prior to its execution.

The objections were overruled by the court, and the plaintiff, by his counsel, excepted.

Defendant, by *his* counsel, then offered in evidence record of a deed for the land described in the complaint from Joseph Hine and wife to Alois Hine, dated September 29, 1864, and recorded in said register's office October 5th, 1864, a copy of which is hereto annexed and made part hereof, marked "Exhibit D."

Plaintiff objected to its admission in evidence on the same grounds as before. The objections were overruled by the court, and the plaintiff, by his counsel, excepted.

92 Defendant, by *his* counsel, then offered in evidence record of a deed for the land described in the complaint from Alois Hine and wife to Henry Loeb, dated April 6, 1868, and recorded in said register's office April 15, 1868, in vol. 24 of deeds, on page 682, of which deed a copy is hereto annexed and made part hereof, marked "Exhibit E."

Plaintiff, by his counsel, objected on the same grounds as before. The objections were overruled by the court, and the plaintiff excepted.

The defendant, by *his* counsel, then offered in evidence a deed for the land described in the complaint from Henry Loeb and wife to Jacob Kessel, dated October 25, 1869, and recorded in said register's office November 1, 1869, a copy of which deed is hereto annexed as a part hereof, marked "Exhibit F."

The plaintiff, by his counsel, objected to its admission in evidence on the same grounds as before. The objections were overruled by the court, and the plaintiff excepted.

The defendant, by *his* counsel, then offered in evidence certificate of Geo. W. Fay, register of the land office at Menasha,

93 Wisconsin, dated April 9th, 1879, showing the entry of the land described in the said complaint by Myron H. Puffer December 6th, 1876, and the issue of a patent for the same on the 4th day of June, 1877, a copy of which is hereto annexed as part hereof, marked "Exhibit G."

Defendant, by *his* counsel, then offered in evidence certificate of the Commissioner of the General Land Office and the order made by him relating to this land in question, a copy of which certificate, together with the paper annexed thereto, is hereto annexed as part hereof, marked "Exhibit H."

Plaintiff, by his counsel, objected to its admission in evidence—

1st. Because it is merely a copy of a letter and because the certificate does not show the paper certified to — be a copy of a record of the land office; and,

2nd. Because the letter certified to shows an act of the Land Department subsequent to issuing the patent to Puffer, and therefore shows that the Land Office had no right to do the act for the proof of which it is offered; and,

3rd. Because it is not the best evidence and immaterial.

The objections were overruled by the court, and the plaintiff excepted to the ruling.

94 Defendant, by *his* counsel, then offered in — record of a

deed from Myron H. Puffer and wife for the land described in the complaint to Abel Keyes, dated Dec. 6, 1876, recorded July 21, 1877, in the register's office of Sheboygan county, a copy of which deed is annexed hereto as a part hereof, marked "Exhibit I," and record of a quitclaim deed for the same land from Abel Keyes to Charles Cornelius, the plaintiff, dated March 15, 1878, and recorded in said register's office March 25, 1878, a copy of which deed is hereto annexed as part hereof, marked "Exhibit K."

It was then stipulated between the parties that the testimony of Christian Kraemer, given on the former trial at the April term, 1880, be admitted in evidence the same as though he were present and testified to the following effect: "I know the land in question, the place where Jacob Kessel used to live on in the town of Russel, in this county. Joseph Hine occupied it before Kessel. It was occupied since Joseph Hine put a house on it, 15 or 16 years ago. A road runs through the middle of the land. There was a clearing on it of about 25 acres on both sides of the road. The buildings were moved away some time ago," subject, however to the
95 plaintiff's objection to the testimony itself.

The plaintiff, by his counsel, objected to the testimony itself as irrelevant. The objection was overruled by the court, and the plaintiff, by his counsel, excepted.

The defendant then rested.

Plaintiff, by his counsel, then offered in evidence the record of the certified list of swamp lands in Sheboygan county belonging to the State of Wisconsin, including E. ½ of N. E. ¼ section 14, township 16, range 20, a part of the land included in the receiver's receipt recorded in the register's office of Sheboygan county on the 12th day of January, 1857, in volume 2 of deeds, on pages 307, 308, and 309, a copy of which list, omitting all other descriptions except said E. ½ of N. E. ¼ of said sect. 14, is hereto annexed as part hereof, marked "Exhibit L."

The defendant, by *his* counsel, objected to its admission in evidence because it is immaterial to this issue. The objection was overruled by the court, and the defendant excepted to the ruling of the court.

The plaintiff, by his counsel, then stated that this was all the evidence of the plaintiff under the counter-claim.

96 The defendant, by *his* counsel, then offered in evidence record of a patent for the land in question from the United States to Myron H. Puffer, dated June 4, 1877, and recorded in the register's office of Sheboygan county in vol. 42 of deeds, on page 13, on the 21st day of July, A. D. 1877, a copy of which patent is hereto annexed as a part hereof, marked "Exhibit M."

The testimony under the counter-claim then closed, and this action being then in its regular order as number one for trial by jury, the plaintiff, by his counsel, demanded then, after the trial of the equitable issue by the court, a trial by jury of the legal issue in the case, to which demand the court replied, "I do not consider there is anything in this case for the jury to try," and the court refused such trial by jury, to which refusal the plaintiff, by his counsel, excepted.

The court thereupon found for the defendant on the counter-claim and filed in due time its findings, a copy of which is hereto annexed as part hereof, marked "Exhibit N."

The plaintiff thereupon filed in due time his exceptions to such findings, a copy whereof is hereto annexed as part hereof,
97 marked "Exhibit O."

The foregoing contains all proceedings, not otherwise of record, had at and on the trial of this cause, and all the evidence given upon the trial of the issues of fact by the court under the counter-claim in this action; all offers of evidence at said trial, objections thereto, and the rulings of the court thereon, and all exceptions taken at said trial; the demand of the plaintiff for a trial by jury of the legal issue in this action; the refusal by the court of such trial by jury after the trial of the equitable issue under the counter-claim in this action, and the exception by the plaintiff to such refusal, and the annexed papers are true copies of the deeds, records, findings of the court and exceptions thereto and papers referred to in the foregoing bill of exceptions and form part hereof.

Witness my hand and seal the 8th day of January, A. D. 1883.

[L. S.] N. S. GILSON, *Judge.*

It is stipulated that the within may be signed & certified as a bill of exceptions.

WM. H. SEAMAN,
Def't's Att'y.
CONRAD KREZ,
Plaintiff's Att'y.

98 Circuit Court, County of Sheboygan.

CHARLES CORNELIUS, Plaintiff,
against
CATHARINA MARGARETHA KESSEL, Defendant.

To Simon Gellen, Esq., clerk of the circuit court of Sheboygan county, and to William H. Seaman, Esq., attorney for the defendant, Catharina Margaretha Kessel.

GENTLEMEN: Take notice that the plaintiff, the above-named Charles Cornelius, appeals to the supreme court of the State of Wisconsin from the judgment of the circuit court of Sheboygan county, herein entered in the office of the clerk of said circuit court on the 27th day of December, A. D. 1882, in favor of the defendant, the above-named Catherina Margaretha Kessel, and against the plaintiff, said Charles Cornelius, dismissing the plaintiff's complaint in this action, and for one hundred and eight dollars and forty-one cents costs, and that the plaintiff appeals from the whole of said judgment.

Yours, etc., CONRAD KREZ,
Att'y for Plaintiff.

Dated May 11th, A. D. 1883.

99 Circuit Court, Sheboygan County.

CHARLES CORNELIUS, Plaintiff, Appellant,
vs.
CATHARINA MARGARETH KESSEL, Defendant and Respondent.

Whereas on the twenty-seventh day of December, A. D. 1882, in the circuit court of Sheboygan county, Catharina Margaretha Kessel, the above-named respondent, recovered a judgment against Charles Cornelius, the above-named appellant, for a dismissal of his complaint and for one hundred and eight dollars and forty-one cents costs; and the above named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin;

Now, therefore, we, Michael Grasser, a resident of the town of Grant, county of Clark, and State of Wisconsin, and Adam Reichert, a resident of the town of Grant, county of Clark, and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against — on said appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from or any part thereof be affirmed the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

MICHAEL GRASSER.
ADAM REICHERT.

STATE OF WISCONSIN, } ss:
Clark County, }

Michael Grasser, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of four hundred dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

MICHAEL GRASSER.

Subscribed and sworn to before me this 31st day of March, A. D. 1883.

NELSON MARSH,
Justice of the Peace.

STATE OF WISCONSIN, } ss:
Clark County, }

Adam Reichert, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of four hundred dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

ADAM REICHERT.

Subscribed and sworn to before me this 31st day of March, A. D. 1883.

NELSON MARSH,
Justice of the Peace.

100 [Endorsed:] — court, — county. —— —— *vs.* —— ——. Undertaking on appeal.

101 SHEBOYGAN COUNTY, *ss:*

The State of Wisconsin, Circuit Court, Sheboygan County.

CHARLES CORNELIUS, Plaintiff,

vs.

CATHARINA MARGARETHA KESSEL, Defendant.

I, Simon Gillen, clerk of the circuit court in and for the county of Sheboygan and State of Wisconsin, do hereby certify that the annexed and foregoing are the original and all the papers and pleadings which have been filed in my office in the above-entitled cause, and the same are herewith transmitted to the clerk of the supreme court for the State of Wisconsin pursuant to the annexed notice of appeal and the direction of the attorney for the plaintiff and appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of this court, at Sheboygan, this 22nd day of May, A. D. 1883.

[SEAL.] SIMON GILLEN,
Clerk of the Circuit Court, Sheboygan County, Wis.

[Endorsed:] Sheboygan county circuit court. —— ——, plaintiff, *vs.* —— ——, defendant. Filed ——, 188–. —— ——, clerk.

102 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the tenth day of the term, to wit, on the twenty-fifth day of September, A. D. 1883—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassoday, associate justices of said court—the following proceedings were had, *inter alia*, to wit:

Appeal From Circuit Court, Sheboygan County, State of Wisconsin.

CHARLES CORNELIUS, Appellant,

vs.

CATHARINE MARGARETHA KESSEL, Respondent.

This cause came on to be heard on appeal from the judgment of circuit court of Sheboygan county, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Sheboygan county in this cause be, and the same is hereby, affirmed with costs against the said appellant, taxed at the sum of fifty-three dollars.

STATE OF WISCONSIN, *ss:*

Supreme Court

I, Clarance Kellog, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this twenty-fifth day of
103 September, A. D. 1883.

[SEAL.] CLARANCE KELLOG,
Clerk of the Supreme Court of the State of Wisconsin.

104 And afterwards, to wit, on the third day of August, A. D. 1883, the said appellant filed his certain notice of argument herein in the words and figures following:

Supreme Court, State of Wisconsin.

CHARLES CORNELIUS, Plaintiff and Appellant,
against
CATHARINA MARGARETHA KESSEL, Defendant and Respondent.

Appeal from circuit court, Sheboygan county.

Please take notice that the appeal from the judgment of the circuit court in the above-entitled action will be brought on for argument at the next August term of the supreme court of the State of Wisconsin, to be held at the capitol, in the city of Madison, on the second Tuesday of August, A. D. 1883, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Yours, &c., CONRAD KREZ,
Attorney for Appellant.

Dated July 18th, 1883.

To Wm. H. Leaman, Esq., attorney for respondent.

Due service of a copy of the within notice admitted this 24 day of July, 1883.

WM. H. SEAMAN,
Attorney for Respondent.

105 And afterwards, to wit, at the August term aforesaid of said court, on the fourth day of said term, to wit, on the sixth day of September, in the year aforesaid, the following proceedings were had in said cause—that is to say:

Sheboygan Circuit Court.

CHARLES CORNELIUS, Appellant,
vs.
CATHARINA MARGARETHA KESSEL, Respondent.

And now, at this day, came the parties herein, by their attorneys, and this cause having been argued by Conrad Krez, Esq., for the

said appellant and by William H. Seaman, Esq., for the said respondent and submitted, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

106 And afterwards, to wit, at the August term aforesaid of said court, on the tenth day of said term, to wit, on the twenty-fifth day of September, in the year aforesaid, the following judgment of the court was rendered in said cause in the words and figures following—that is to say:

Sheboygan Circuit Court.

CHARLES CORNELIUS, Appellant,

vs.

CATHARINA MARGARETHA KESSEL, Respondent.

This cause came on to be heard on appeal from the judgment of the circuit court of Sheboygan county and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Sheboygan county in this cause be, and the same is hereby, affirmed with costs against the said appellant, taxed at the sum of fifty-three dollars ($53.00).

Upon the announcement of which said judgment the opinion of the court by Chief Justice Cole was filed in the words and figures following—that is to say:

Opinion by Cole, C. J.

107 Supreme Court.

CHARLES CORNELIUS, Appellant,

vs.

CATHARINA MARGARETHA KESSEL, Respondent.

On the former appeal (53 Wis., 403) it was said the answer of the defendant showed strong equities to the land in controversy. The force of that remark was certainly not weakened by anything disclosed in the proofs on the second trial. The facts in the answer were fully established by the evidence, and it would seem almost a reproach upon the administration of justice if such a meritorious defence should fail. It is not claimed that the entry of this forty by Davidson in January, 1856, was in conflict with any State land grant or prior sale. The land was then subject to entry; it was purchased by him and paid for; there was no fraud or mistake in the transaction; the receiver took the price of the land and gave his receipt therefor. These are facts which cannot be successfully controverted. All the rights and interests which Davidson acquired by this entry became vested in the defendant's testator, who had been in continuous possession of the premises some years before he died, and had made improvements thereon. It is true there was included in

Davidson's purchase and in the receiver's receipt another tract
108 of eighty acres, which the United States did not own, but which belonged to the State under the swamp land grant; but as respects this forty the United States owned it and sold it for cash—parted with all its interests in it except the mere naked legal title, which it held in trust for the purchaser or his assigns. We may well adopt, as regards this forty, the language of Mr. Justice McLean, in Carroll *vs.* Safford, 3 How. U. S., 440, 460, and say, "When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be cancelled by the United States than a patent. It is true if the land had been previously sold by the United States or reserved from sale the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee."

The learned counsel for the plaintiff insisted there was a distinction between the case where the purchaser obtains the register's final certificate and where he merely holds the receiver's receipt, but both instruments stand upon the same footing. The purchaser's rights are founded on the contract of purchase and payment of money, and the statutes of this State have always given the same
effect to both instruments as evidence of title (sec. 95, ch. 98,
109 R. S. 1849; sec. 103, ch. 137, R. S. 1858, and sec. 4165 R. S. 1878), and there is no earthly reason that we perceive for making a distinction between them so far as the rights of the purchaser are concerned. Such being the case, it is clear that the order of the Commissioner of the General Land Office, made Oct. 24, 1857, cancelling the entry of this forty was without authority in law and void. The Commissioner had no authority whatever to cancel the entire entry because of a conflict as to one of the tracts embraced therein without first giving the party in interest the right of election as to whether he desired to retain that forty, and no effect can be given to his order. At most the cancellation could only affect the tract to which the Government, by reason of a prior disposal, could give no title. It is not necessary for the defendant to invoke the aid of Commissioner Williamson's order, made June 3, 1879, reinstating this entry because the original cancellation was void. The plaintiff's counsel claims that the Commissioner had no jurisdiction to make the order of reinstatement because the legal title had passed from the Government by the patent issued to Puffer. It may be conceded that this position is correct, but still the defendant's rights may well rest on the original entry, which vested in Davidson the
equitable title, with the right to receive the patent for the land.
110 The counsel for the plaintiff further insists that the defendant could not in this action have the benefit of the equitable defense set up in the counter-claim. We fail to perceive any good reason why she cannot have the benefit of that defence. The subject of the action is the land in controversy. The defendant states facts in the counter-claim which show that the equitable title to the property has become vested in her during her natural life, with the

right of possession; that the legal title which passed to Puffer by the patent was wrongfully obtained, and should have gone to her testator. She asks that the court adjudge the entire title in her testator at his decease; in other words, that the legal title under the patent may enure to the benefit of the devisees under the will of Jacob Kessel. There is no doubt but that the defendant was entitled to such relief in this case. Simmons *vs.* Ogle, 105 U. S., 271. Perhaps the judgment which was rendered on the equitable issue is equivalent to this. It was adjudged that the entry by and patent to Puffer were null and of no effect as a conveyance of the land; that the defendant's testator died vested with an equitable estate in the premises and entitled to the possession thereof and to a patent therefor from the United States, assuring the legal title through the original purchaser, Davidson, to his devisees; that the defendant have and enjoy such interest and estate, with the possession during her life. If there are any formal defects in this judgment
111 there is nothing of which the plaintiff can complain. He cannot be prejudiced by the cancellation of the patent, because the legal title vested in him by that instrument must, under the circumstances, enure to the benefit of those who have the superior equity and right to it. The court might have adjudged that the legal title be vested in the devisees of Jacob Kessel, subject to the life estate of the defendant.

After the trial of the equitable issue the plaintiff, by his counsel, demanded a trial by the jury of the legal issue. To this demand the court replied that it did not consider there was anything for a jury to try and denied it. The plaintiff did not claim or pretend that he had any title to the premises except such as he derived through the patent. If he claimed the premises through any other source it was his duty to disclose his title to the court, so it might see there was something for a jury to try. It was certainly not the duty of the court to submit to a jury the sufficiency of a title founded on the patent which the court had just adjudged was invalid and could not prevail as against the defendant. There was, therefore, no error on the part of the court in refusing a jury trial of the legal issue on the facts disclosed in the record.

It follows from these views that the judgment of the circuit court must be affirmed.

112 STATE OF WISCONSIN, *ss:*

Supreme Court.

CHARLES CORNELIUS, Appellant,

vs.

CATHARINA MARGARETHA KESSEL, Respondent.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause; that the original writ of error, the citation,

with its service endorsed thereon, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this — day of ——, A. D. 1885.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court, Wisconsin.

113 [Endorsed:] Charles Cornelius, plaintiff in error, *vs.* Catharina Margaretha Kessel, defendant in error. Return to —. Writ of error.

STATE OF WISCONSIN, *ss:*

Supreme Court.

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

Endorsed on cover: Wisconsin supreme court. No. 321. Charles Cornelius, plaintiff in error, *vs.* Catharina Margaretha Kessel. Filed October 1, 1885.

Office Supreme Court U. S.
FILED.
NOV 2 1888
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

CHARLES CORNELIUS, PLAINTIFF IN ERROR,

vs.

CATHARINA MARGARETHA KESSEL.

BRIEF OF PLAINTIFF IN ERROR.

CONRAD KREZ,
Attorney for Plaintiff in Error.

ED. KEOGH, PRINTER, NEW INSURANCE BUILDING, BROADWAY, MILWAUKEE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES CORNELIUS,
PLAINTIFF IN ERROR,
vs.
CATHARINE MARGARETHA KESSEL.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

In this case Charles Cornelius, the plaintiff in error was appellant in the Supreme Court of the State of Wisconsin in an appeal from a judgment rendered against him by the Circuit Court of Sheboygan County in favor of Catharine M. Kessel in an action of ejectment, wherein said Cornelius was plaintiff, Catharina M. Kessel defendant.

The judgment of the Supreme Court of Wisconsin on such appeal, which, under section 3070 of the Revised Statutes of Wisconsin involved a review of all intermediate orders affecting the merits, affirmed the judgment of the said Circuit Court.

Such judgment of the court below was a judgment upon the trial by the court of an equitable counter-claim set up by the defendant Kessel

in her answer to the plaintiff's complaint in ejectment for the recovery of the N. W. ¼ of the N. W. ¼ of section 13, township 16, range 20, in Sheboygan County, Wisconsin, rendered in favor of such defendant after a refusal by the court of a trial by jury of the issues at law joined in the action. (Case, p. 37.)

By the judgment and findings of such Circuit Court affirmed by the Supreme Court of Wisconsin, the cancellation of the entry under which the defendant claimed, by the general land office of the United States, was adjudged to be null and void and such entry to have been properly re-instated by the Land Department after a patent for the land had been issued by the UnitedStates, and the entry and the patent of the United States under which the plaintiff Cornelius' claims were further adjudged to be null and void and of no effect as a conveyance of title to the land in question.

The pleadings in the action of ejectment are: 1st, a complaint in the form prescribed by the Wisconsin statute alleging title in fee simple to land in the plaintiff and wrongful detention from him by the defendant, asking surrender of possession and damages for withholding.

2d. An answer, denying the plaintiff's title to the land and his right to its possession and admitting possession by the defendant at the time of the commencement of the action; also pleading the statute of limitation in favor of the defendant, and setting up the following counter-claim, viz.: that January 29th, 1856, one Henry J. Davidson made a cash entry of the E. ½ of the N. E. ¼ of section 14, and of the said N. W. ¼ of N. W. ¼ of said section 13, all in Township 16, Range 20, in said Sheboygan County, and paid the purchase price and obtained the usual duplicate receiver's receipt, which was afterwards recorded on the 30th of April, 1857, in the Register's office of said Sheboygan County; that afterwards (January 4th, 1859), such N. W. ¼ of the N. W. ¼ of said section 13, was conveyed by said Davidson, and that through such and subsequent conveyances the title to such 40 acre piece was vested in Jacob Kessel, the defendant's husband, who devised a life interest in said land to his widow, the defendant, under which devise she claims to hold the possession thereof; that said Davidson entry was erroneously cancelled October 24th, 1857, by the General Land Office, without notice to Davidson, for the reason that the 80 acre tract included in said Davidson entry had been included in a prior grant to the State of Wisconsin, while the 40 acre tract in question was then subject to entry, and that

neither the defendant nor those under whom she claims ever had notice of such cancelation.

That one Abel Keyes, who at all or most of the times mentioned, had been receiver or register of the land office at Menasha, in which district said land was situated, procured fraudulently one Myron Puffer to procure a patent from the United States for the land described in the said complaint, which patent is dated June 4, 1877, and was issued upon an (additional) homestead entry dated December 6, 1876, and that all claim of title in said plaintiff is derived wholly under the fraudulent title of said Keyes; and that such plaintiff had notice of the rights and equities of the defendant, and that said entry and patent of Puffer were canceled by the Commissioner of the General Land Office.

3d. A reply, by which all material allegations of the counter-claim were denied.

At the September term of the Circuit Court of Sheboygan County, 1882, the case came on for trial, and under the objection of the plaintiff the Court ordered the counter-claim to be tried first.

On the trial thereof the following facts appeared by the evidence offered by the defendant, and admitted by the Court, to establish her counter-claim.

Jauuary 29, 1856, Henry J. Davidson, of Sheboygan County, paid to the receiver of the Menasha, Wis., land office $150 in full for 120 acres contiguous land, consisting of the E. ½ of the N. E. ¼ of section 14, and of the N. W. ¼ of N. W. ¼ section 13, township 16, range 20, and received the usual receiver's duplicate receipt therefor.

October 24, 1857, the entry made for such 120 acres by Davidson on said receipt was cancelled by the Commissioner of the General Land Office, because the E. ½ of the N. E. ¼ of said section 14 had been approved to the State of Wisconsin as swamp land Oct. 28, 1854.

October 24, 1857, by letter of that date, the local officers were notified of the cancelation and instructed to notify said Davidson to apply for the return of the purchase money.

January 4, 1859, Henry J. Davidson gave a warranty deed for such N. W. ¼ to Joseph Hine, if such deed conveyed any title to said N. W. ¼, such estate was in the defendant's husband, Jacob Kessel, at the time of his death in July, 1876, and that by his will the defendant has a life interest in all the real estate owned by Jacob Kessel at the time of his death.

December 6, 1876, (no adverse right as appeared from the tract book, attaching to the land), one Myron H. Puffer entered said N. W. ¼ of the N. W. ¾ under an additional homestead entry commuted for a cash certificate.

December 6, 1876, Myron H. Puffer and wife quit-claimed said N. W. ¼ to Abel Keyes for $50.

June 4, 1877, a patent of the United States for such N. W. ¼ in due form was executed and delivered to Myron H. Puffer.

July 21, 1877, such patent was recorded in the register's office of Sheboygan County.

March 15, 1878, Abel Keyes quit-claimed to the plaintiff in error said N. W. ¼ for $400.

The land in question was occupied for 15 or 16 years previous to 1880, since Joseph Hine put a house on it. There is a road on the land and clearing of about 25 acres. The buildings had been moved away some time ago, previous to 1880.

June 3, 1879, two years after the patent to Puffer was issued, the Davidson entry was re-instated by the commissioner of the general land office.

No attempt was made to prove fraud on the part of the plaintiff or any of the plaintiff's predecessors in title.

On the part of the plaintiff it was proven that January 12, 1857, an official list of swamp lands belonging to the State and situated in Sheboygan, was recorded by the Governor of Wisconsin in the register's office of said county, which contained the E. ½ of the N. E. ¼ of section 14, township 16, range 20, as swamp land.

Thereupon the judgment upon such counter-claim was rendered dismissing the plaintiff's complaint with costs.

ASSIGNMENT OF ERROR AND ARGUMENT.

I.

The Supreme Court of Wisconsin erred in affirming on the merits the findings and judgment of the Circuit Court of Sheboygan County, because the latter had erred in deciding that the cancellation of the Davidson entry of 120 acres, consisting of 80 acres of swamp land previously conveyed by the United States and of 40 acres of public land subject to entry, was void. The character of the 80 acres as swamp land is uncontradicted. By section 453, Rev. St. U. S. the commissioner of the general land office is

required to perform under the direction of the Secretary of the Interior all executive duties appertaining—to the sale of public lands of the United States, or in anywise respecting such public lands and also such as relate to private claims of land. When the proposed contract, therefore, of Davidson for the purchase of the 120 acres of land was reported to him, and he found on October 24. 1857, (the time of cancellation), that 80 acres of the land were included in the prior grant made to Wisconsin September 28, 1850, by the swamp land act, and had already been approved and patented to such State, he had to ascertain, whether there was a contract for him to execute or not, and he also had to decide the private claim of Davidson to the land, and his decision was, that there was no contract between the United States and Davidson in the matter and such decision was right and in accordance with the elementary principle of law; *that unless the parties to a contract assent to the same thing in the same sense*, there is no contract, and the United States could not, and by its proper officer did not, assent to a contract which required a second conveyance of land already conveyed. The cancellation of the Davidson entry was therefore in accordance with law within the scope of the authority conferred upon the commissioner, and is *res adjucata* and conclusive.

Moore vs. Robbins, 6 Otto, 535
Steel vs. Smeltin Co., 16 Otto 451.

II.

The Supreme Court of Wisconsin also erred in affirming on the merits the decision of the lower court, that said cancelled entry of Davidson was properly reinstated. The land was patented to Puffer June 4, 1877, the entry was reinstated June 3, 1879, two years afterwards. The act of reinstatement was unauthorized in defiance of the then recent decision in the case of the United States vs. Schurz, 12 Otto, 378. It was made for the avowed purpose to prejudge the plaintiff's case in the courts in which he was about to seek redress.

III.

The Supreme Court of Wisconsin erred in affirming the finding and judgment of the Circuit Court of Sheboygan, that the Puffer entry and

patent are null and void and of no effect as a conveyance of said 40 acre piece. The action was an action of ejectment, and in such an action, when the question is presented whether the plaintiff or the defendant has the superior legal right, the patent must prevail.

Gibson vs. Chonteau. 13 Wall, 102.

When Puffer made his entry the records of the land office showed that the land in question was subject to entry, that 20 years ago an entry thereupon had been cancelled, because it had been included in a purchase, of which two-thirds of the land had been land not subject to sale by the United States. For so long a time no person had appeared to dispute the cancellation. No fraud, no notice of adverse claims appears by the testimony, there was not even an attempt to impeach the good faith of the plaintiff or of his grantors. Upon the record of the land office no patent could have issued to Davidson, could it be contended that there was no jurisdiction in the land department to sell the land, and if there was authority then the presumptions in favor of the Puffer patent are conclusive.

Smelting Co. vs. Kemp, 104 U. S., 636, 641.

IV.

The Supreme Court of the State erred in affirming the judgment of the court below, dismissing the plaintiff's complaint with costs and refusing a trial by jury of the issues at law in the ejectment case.

After the trial of the counter-claim had closed the issue at law in the action of ejectment was then in its regular order for trial by jury, and the plaintiff then demanded a trial by jury of the issues at law, to which demand the court replied: "*I do not consider there is anything in this case for the jury to try.*" and the trial by jury was refused. *Case, fol. 96.*

As the Supreme Court of the State affirmed the judgment and such refusal, it must be assumed that the judgment and refusal are authorized by the law of the State of Wisconsin in actions of ejectment, and such a law is clearly against the prohibition in the XIVth Amendment to the Constitution of the United States, by which the States are forbidden to deprive any person of life liberty or property without due process of law.

It is clear that the plaintiff might prove a title entirely different from that set out in the counter-claim, or in this case the plaintiff for instance would have had a right under the general issue to prove that the money paid by Davidson was refunded by the government. A fact which I do not claim to exist, but it might exist.

The plaintiff in error, therefore, demands the reversal of the judgment of the Supreme Court of Wisconsin and the mandate of this court directing such Supreme Court to order the Circuit Court of Sheboygan County to allow the plaintiff to proceed to a trial by jury of the issues at law in his said action of ejectment.

CONRAD KREZ,
Attorney for Plaintiff in Error,